SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1578

AUDREY S. HARTEL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN HARTEL, DECEASED,
Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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This action was brought by petitioner, on her own behalf and as administratrix of her deceased husband's estate, for damages under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* The first trial of this action resulted in a mistrial. At the retrial, respondent's motion for a directed verdict was granted at the close of petitioner's case, and the United States District Court for the Southern District of New York entered judgment dismissing the complaint. The United States Court of Appeals for the Second Circuit affirmed, one judge dissenting, and thereafter denied a petition for rehearing containing a suggestion for rehearing en banc, three judges dissenting.

COUNTERSTATEMENT OF QUESTION PRESENTED

The court of appeals held that there was not sufficient admissible evidence of foreseeability, negligence and causation in the record to present a jury question. The propriety of that decision is the only question presented here. This case does not present the question whether, notwithstanding petitioner's failure to establish the elements of a cause of action under the Federal Employers' Liability Act, she was denied her right to trial by jury. Nor does it present the question whether the requirements of proof and the standard of care in a negligence case have been or ought to be modified.

COUNTERSTATEMENT OF THE CASE

Petitioner's husband, John Hartel, a ticket agent employed by respondent, was shot and killed during the course of a robbery by three assailants at the Mineola, New York, passenger station on February 18, 1968. On that morning, a station porter on duty with Mr. Hartel was in the men's room when he heard "a fuss" in the waiting room downstairs. (R. 57.)* He looked out the window and saw Mr. Hartel walking toward a nearby hospital. (R. 61.) When the local police arrived to investigate, they found Mr. Hartel lying in the street, apparently dead. (R. 42.) A steel shutter over the ticket office window, ordinarily opened from the waiting room, was found to have been raised to about two-thirds of its length. (R. 46.) There was no other evidence as to the circumstances of the robbery or of Mr. Hartel's death.

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*References cited to "R." are to the record below; references cited to "Pet. App." are to the opinions of the district court (Pet. App. 12a-14a) and the court of appeals (Pet. App. 2a-11a) which are printed in Petitioner's Appendix.

There had not been any prior crimes at the Mineola station (Pet. App. 13a), and there was no evidence of any unusual dangers or unsafe conditions at that station. (Pet. App. 7a.)

ARGUMENT

The decision below is clearly correct. It is not in conflict with the decisions of any other court of appeals or of this Court. No special or important reason exists for granting a writ of certiorari, and no further review is warranted.

1. There is absolutely no evidence in the record that the crime which resulted in Mr. Hartel's death was foreseeable, or that if foreseeable, his death resulted in any respect from respondent's negligence. Petitioner's failure to establish any of the elements of a cause of action under the Federal Employers' Liability Act required a directed verdict in respondent's favor.*

The Federal Employers' Liability Act is not a workmen's compensation statute. Liability under the Act is based upon negligence, and unless petitioner can prove that respondent was at fault, she cannot recover. If she fails to adduce any evidence from which a jury might make such a finding, her complaint must be dismissed as a matter of law. *See, e.g., New York, N. H. & H. R. R.* v. *Henagen,* 364 U. S. 441 (1960); *Inman* v. *Baltimore & O. R. R.,* 361 U. S. 138 (1959); *Herdman* v. *Pennsylvania R. R.,* 352 U. S. 518 (1957).

Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence.

*Petitioner's claim that she was deprived of her right to a trial by jury by virtue of a directed verdict (Pet. 2, 7) is wholly without support. Nothing in the Constitution, the Act or in the decisions of this Court prevents a trial court from directing a verdict if the essential proof necessary for a finding of liability is wholly lacking. Galloway v. United States, 319 U. S. 372, 388-396 (1943).

Gallick v. *Baltimore & O. R. R.*, 372 U. S. 108, 117 (1963); *Inman* v. *Baltimore & O. R. R., supra.* Unless foreseeability is established, the court cannot even reach the question whether the precautions taken to guard against the harm were reasonable. *Lillie* v. *Thompson*, 332 U. S. 459 (1957).

John Hartel's death was caused by persons not employed by or under the control of respondent. It was instead the result of the criminal acts of strangers. Inasmuch as "under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the presumption that others will obey the criminal law. . . ." *W. Prosser, Torts* 175-76 (3d ed. 1964), it was petitioner's burden to show that, notwithstanding such a presumption, respondent had reason to foresee a criminal attack upon her husband at the Mineola station. She did not carry that burden. She proffered no evidence that an attack was likely, probable or foreseeable. There was no evidence either offered or admitted to show (1) any prior holdups or criminal attacks at the Mineola station; (2) any complaints by anyone concerning the safety of railroad employees at the Mineola station; (3) any warnings that the crime might occur; or (4) any other circumstances, such as the presence of dangerous persons, that would put respondent on notice that the Mineola station might be the target of a criminal attack. Accordingly, the trial court correctly concluded:

> "Plaintiff has introduced no evidence showing that defendant should have reasonably foreseen the possibility of a holdup at the Mineola Station." (Pet. App. 14a.)

2. Petitioner argues that having made foreseeability the "pivot on which liability turns," the courts below strictly excluded evidence tending to establish a basis for foresee-

ability." (Pet. 4-5.) That argument was similarly made to and rejected by the Second Circuit.

No evidence relating to the foreseeability of a criminal attack at the Mineola station was excluded. None was offered. Instead, petitioner attempted to show that during the four years prior to the incident in question, several crimes had been committed in other passenger stations, some almost 30 miles away. No foundation was laid for the admission of such evidence; there was no showing that the prior crimes occurred under conditions in any way similar to those at the Mineola station in 1968. Thus, the evidence offered was probative of nothing.

Unless there is a substantial similarity in time, place and nature between the prior crimes and the one in question, evidence of prior crimes is inadmissible and insufficient to put the railroad on notice of a danger to be foreseen at the situs of the incident. Such evidence is not relevant and could be highly prejudicial. *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416 (1960); *Plough* v. *Baltimore & O. R. R.*, 164 F. 2d 254 (2d Cir. 1947), *cert. denied*, 333 U. S. 861 (1948).* Throughout the trials and appeals of this action, petitioner has never cited a single case in which evidence of prior crimes or accidents not occurring at the situs of the incident in question has been admitted to show foreseeability. Accordingly, the Second Circuit's decision that the trial

*Gallick v. Baltimore & O. R. R., 372 U. S. 108 (1962), cited by petitioner, supports respondent's position. There an employee was bitten by an insect in the vicinity of a stagnant, vermin-infested pool. The railroad had notice of that dangerous condition. Although the jury found in a special interrogatory that the railroad was negligent, it also found that the railroad had no reason to anticipate that injury might result from the dangerous condition. The inconsistency was resolved in the employee's favor, and the Court criticized an instruction from which the jury might have determined that since no mishaps had occurred at the pool in the past, there was no reason to anticipate injury to the petitioner. In the case at bar, on the other hand, there was no pre-existing "dangerous condition" of which respondent had notice. It is as if in *Gallick* there had been an insect bite but no stagnant pool.

court properly rejected the evidence proffered by petitioner was entirely correct.

Moreover, the trial court correctly rejected unrelated correspondence (Pl. Ex. 12, 13; R. 177, 178) and testimony (R. 85-114) as to conversations between union officials and respondent relating to requests for increased protection for ticket clerks. It was established at trial that none of the testimony and correspondence related to the Mineola station, hence it could not establish notice to respondent that the Mineola station was an unsafe place to work.

Finally, the trial court properly excluded rank hearsay concerning a conversation between petitioner and a general attorney for respondent.* Mrs. Hartel offered to testify that at her husband's funeral, the attorney, who had been a friend of Mr. Hartel's, told her that her husband had once mentioned to him that "he was afraid of working at the Mineola station". (R. 120-21.)** The attorney was not called as a witness, no showing was made that he was unavailable, nor were the applicable portions of his deposition read. Moreover, no showing was made that he was authorized by the railroad to receive notice of dangerous conditions or that Mr. Hartel had intended to give the railroad such notice. *See Schilling* v. *Delaware & H. R. R.,* 114 F. 2d 69 (2d Cir. 1940).

Even if the trial court erred by excluding certain evidence, however, that does not entitle petitioner to a new trial. Since none of the excluded evidence tended to show that respondent had notice of the likelihood of a criminal attack at Mineola, it would not have been sufficient to establish foreseeability. In all events, there is no evidence that respondent was negligent or that its negligence in any way

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*Petitioner incorrectly refers to that attorney as a member of respondent's claims department. (Pet. 5; *but see* R. 127.)

**The petition incorrectly states, without citation, that the testimony concerned "the unsafe condition at the Mineola station." (Pet. 5.) There is no such evidence in the record.

contributed to Mr. Hartel's death. Petitioner's suggestion on appeal that a peephole or a different type shutter could have been installed is gratuitous; since there was no evidence of how Mr. Hartel was killed, it would have been grossly improper to permit a jury to speculate that the lack of such devices contributed in any way to his death. As the Second Circuit concluded:

> "Although absent foreseeability, plaintiff's case was deficient as a matter of law, the Trial Court also said: '[O]n judicial appraisal, I find that negligence on the part of defendant railroad could have played no part in the death of plaintiff's intestate'. We agree. Even if the LIRR had installed, as plaintiff now suggests, either a steel shutter opening from the inside or a peep-hole which might have enabled the agent to observe persons in the waiting room, these measures would not have protected him from assault and murder." (Pet. App. 9a.)

3. This case presents no special or important reasons for further consideration by this Court. All of petitioner's contentions have been fully and fairly heard by the courts below. There is no conflict among the circuits, nor has the court below decided an important question which has not been, but should be, settled by this Court.* Accordingly, further review is unwarranted.

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*Mr. Justice Frankfurter, dissenting in Ferguson v. Moore-McCormack Lines, 352 U. S. 521, 546 (1957) observed:

> "For the Supreme Court of the United States to spend two hours of solemn argument, plus countless other hours reading the briefs and record and writing opinions, to determine whether there was evidence to support an allegation [of negligence] . . ., is surely to misconceive the discretion that was entrusted to the wisdom of the Court for the control of its calendar. The Court may or may not be 'doing justice' in the four insignificant cases it decides today; it certainly is doing injustice to the significant and important cases on the calendar and to its own role as the supreme judicial body of the country."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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